(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR.

CRIMINAL APPEAL NO. 1007 /2002

APPELLANTS (IN JAIL) :

1) Chandrabhushan, s/o. Ravi-Shankar Tiwari, age 25 years Occupation- Photo shop, r/o. House of brother Shashi-Bhushan, Wadrafnagar, Distt. Surguja (Chhattisgarh).

2) Narendra Mishra, s/o. Jai-karan Mishra, occupation - General Stores, r/o. own house, village-Rajkheta, Wadrafnagar, Distt. Surguja.

3) Ramesh Mishra, s/o. Yagya-Prasad Mishra, age 30 years, occupation-Watch Mechanic, r/o. House of uncle Narendra, Rajkheta, Wadrafnagar, Distt. Surguja (C.G.).

4) Brijesh Kumar Mishra, s/o. Yagyaprasad Mishra, age 25 years, occupation-unemployed, r/o.House of Grand-father, village-Khairadad, P.S. - Garhwa, Distt. Sidhi.

5) Sashibushan, s/o. Ravishankar Tiwari, age 30 years, Occu.- General Store, r/o. own house Wadrafnagar,, Surguja (C.G.).

(3679) Filed on 23.9.02 by Shri A.K. Prasad Advocate R. to D.R.(J)

VERSUS

RESPONDENT : The State of Chhattisgarh, thorough : S.H.O., P.S. Basantpur, Distt. Surguja (C.G.).

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973.

(65)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No. 1007/2002

Chandrabhushan & others

Vs.

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
Dilip Raosaheb Deshmukh
Judge

06-09-2005

HON'BLE SHRI JUSTICE L.C.BHADOO

I agree

Sd/-
L.C.BHADOO
Judge

6 -09-2005

Post for 15-09-2005 at 4.15 P.M

Sd/-
Dilip Raosaheb
Deshmukh
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1007/2002

Chandrabhushan & others

Vs.

State of Chhattisgarh

Coram :- **HON'BLE SHRI JUSTICE L.C. BHADOO &**
HON'BLE SHRI JUSTICE DILIP RAOSAHEB DESHMUKH, JJ

Shri Abhay Tiwari, Counsel for the appellant.
Shri J.D.Bajpai, Govt. Advocate/Additional Public Prosecutor with Shri Devesh Verma, Panel Lawyer for the State.

(The following Judgment is delivered on 15-09-2005)

Per Dilip Raosaheb Deshmukh, J.

01. This appeal is directed against the judgment dated 29-08-2002 passed in Sessions Trial No. 142/2000 by Shri A.K. Gaikwad, Additional Sessions Judge, Link Court, Ramanujganj, District-Sarguja whereunder the appellants were convicted under section-147, 148, 149 read with 304 Part-I I.P.C. and section-323 read with section-149 of the I.P.C. and sentenced under section 304 Part-I read with section-149 of the I.P.C. to imprisonment for life and to pay a fine of Rs. 100/- each and in default of payment of fine to undergo further R.I. for one month, under section-148 of the I.P.C., to rigorous imprisonment for 1 year each and to pay a fine of Rs. 100/- each and in default of payment of fine to undergo further R.I. for one month and under section-323 read with section-149 of the I.P.C. to rigorous imprisonment for 1 year each. No sentence was awarded to the appellants under Section 147 of the I.P.C.

02. Learned counsel for the appellant Shri Abhay Tiwari has at the outset made a submission before us that he does not press this appeal so far as the conviction and sentence awarded to the appellants under section-148 and section-323 read with section-149 of the I.P.C. is concerned because the appellants have undergone the sentence awarded thereunder. He confined his arguments only to the conviction of the appellants under section-304 Part-I of the I.P.C. and sentence awarded thereunder by the Trial Court by contending that the act of the appellants did not travel beyond section-304 Part-II of the I.P.C. and therefore, the sentence of life imprisonment awarded by the trial Court was excessive and should be suitably reduced.

03. Briefly stated the prosecution case is that a day prior to the incident i.e. on 29-01-2000 there was a Panchayat Election. In that Election, the appellant No.2 Narendra Mishra had defeated the complainant Bhagwat PW-16. On 29-01-2000 at about 8 A.M. while Bhagwat PW-16 was at his residence with one Baijnath PW-10, appellants arrived in a jeep and asked Baijnath to refund Rs. 2,200/- since he had not voted for them. Bhagwat PW-16 said that since they have won the election they should not ask for refund. Upon this the appellants who were armed with lathies started assaulting Bhagwat PW-16. When Baijnath, Kanti Devi PW-12 wife of Bhagwat, Rukmania Bai PW-11, Sandeep and Manjeet both sons of Bhagwat intervened, the appellants assaulted them with lathies. During the assault Bhagwat, Baijnath, Kanti Devi, Rukmania, Manjeet and Sandeep sustained injuries. Although Manjeet and Bhagwat had sustained grievous injuries, no charge under section-325 read with section-149 of the I.P.C. was framed against the appellants. Sandeep, who had sustained only one injury on the head fell unconscious at the spot and later succumbed to the injuries on the same day. Dr. P.L. Verma, PW-4, who had earlier during the day on 29-01-2000 had examined Sandeep also,

conducted the autopsy on him and found that there was swelling on the right side of the skull of Sandeep with no other external injury. On dissection he found fracture of the right parietal and zygomatic bone and laceration of the right parietal area and opined that death was due to coma as a result of head injury which was homicidal in nature.

04. F.I.R. was lodged by Bhagwat PW-16 in Police Station-Basantpur vide Ex.P-33 on 29-01-2000 at 11.45 A.M. Baijnath, Bhagwat, Kanti Devi, Rukmania Bai and Manjeet were sent for medical examination. Manjeet sustained fracture of left humerous mid 1/3rd. No external injury was seen on Kanti Devi who complained of pain in back. Rukmania sustained a contusion on the right side of the skull 6 x 6 cm in size and another contusion on the lower side of the right hand 3 x 2 cm Bhagawat sustained 3 abrasions, two on the right hand and one on the left leg and also sustained lacerated wound on the skull 9 x 1 ½ cm into muscle deep and contusion on the left side of back 10 x 3 cm with the 5th, 6th and 8th ribs fractured underneath. Baijnath had sustained one contusion on the right thigh 7 x 5 cm and complained of pain at the back. The injuries sustained by Bhagwat, Baijnath, Manjeet and Rukmania were opined to have been caused by hard and blunt object. On the basis of memorandum of appellants Chandrabhushan vide Ex.P-1, Brajesh Kumar vide Ex.P-2, Ramesh Kumar vide Ex.P-7 and Narendra Mishra vide Ex.P-9, one lathi was seized from each appellant respectively vide Ex.P-3, P-4, P-10, P-11 and vide memorandum Ex.P-5 one lathi thrown by the appellant Shashibhushan was seized vide Ex.P-25. After completion of investigation, the appellants were prosecuted for the offences under section-147, 148, 302 read with section-149 and 323 of the I.P.C.

05. Shri A.K. Gaikwad, learned trial Judge framed charges under section-147, 148, 323 read with section-149 of the I.P.C. for assault on Bhagwat, Baijnath, Kanti Devi and Rukmania Bai and under section-302 read with section-149 of the I.P.C. against all the appellants for committing murder of Sandeep. Although there was material on record to show that Manjeet and Bhagwat had sustained grievous injuries and evidence was also led by the prosecution to that effect Shri A.K.Gaikawad did not frame a charge under section-325 read with section-149 of the I.P.C. against the appellants. It is pertinent to note that although while awarding the sentence, in para-41 he had written that Bhagwat had sustained 3 fractures on the ribs and Manjeet had also sustained fracture in the left humerous bone, yet strangely though, it did not occur to him, at any stage of the trial to amend the charge under section-325 read with section-149 of the I.P.C. against the appellants. It was nothing but sheer callousness on the part of the trial Judge.

06. The accused appellants abjured the guilt, pleaded in defence that Bhagwat and his family members were aggressors and had assaulted Narendra who had fallen to the ground. When Ramesh intervened, he was also assaulted. No evidence in defence was led. The Prosecution examined as many as 25 witnesses. The trial Court relying upon the testimony of Baijnath PW-10, Rukmania PW-11, Kanti Devi PW-12, Bhagwat PW-16, Manjeet PW-23 and Satyanarayana PW-14 which was corroborated by the testimony of Dr. P.L.Verma PW-4 and Dr. M.K. Jain PW-19 held the appellants guilty for offences under Section-147, 148, 323 read with Section-149 and Section-304 Part-I read with Section-149 of the I.P.C. and sentenced them as aforesaid.

07. During arguments, learned counsel for the appellants Shri Abhay Tiwari has argued that Dr. P.L. Verma, PW-4 had examined Sandeep on 11 A.M. on 29-01-2000 and found

one contusion on the right side of the skull 7 "x 5" in size. Sandeep was in a stage of sub-consciousness and was receiving convulsions. During autopsy conducted on the same day Dr. Verma did not find any other injury on Sandeep. Learned counsel, therefore, contended that this single injury could have been caused only by one of the appellants and not by all. He argued that although the prosecution had led evidence to show that all the appellants were engaged in *Marpeet* with Bhagwat, Baijnath, Manjeet, Kanti Devi and Rukmania Bai and Sandeep, yet the fact that Sandeep had sustained only one injury i.e. swelling on the right side of skull clearly shows that the appellants did not intend to cause the death of Sandeep. He argued that at the most, the act of the appellants was such that knowledge that it was likely to cause death could be attributed to them and therefore it would fall under section 304 part-II of the I.P.C. and not beyond that. On the other hand, learned counsel for the State has contended that the manner in which the appellants were engaged in the *Marpeet* and were assaulting Bhagwat, Baijnath, Kanti Devi, Rukmania Bai, Manjeet and Sandeep it was obvious that the appellants had come to the house of Bhagwat with pre-meditation and prior deliberation and had caused the death of Sandeep intentionally.

08. Having heard the rival contentions we have gone through the record of Trial Court and find that there is overwhelming evidence on record coming from Baijnath PW-10, Rukmania Bai PW-11, Kanti Devi PW-12, Bhagwat PW-16 and Manjeet PW-23 which shows that the appellants had arrived at the residence of Bhagwat and had assaulted Baijnath, Bhagwat by lathi. When Kanti Devi, Rukmania Bai, Manjeet and Sandeep intervened, the appellants assaulted them. It is only in the testimony of Manjeet PW-23 that we find that the witness has said that it was the appellant Shashi Bhushan who had assaulted Sandeep by a lathi on the head, back

and throat. Baijnath PW-10 has deposed that after he was assaulted he became unconscious. After regaining consciousness he saw that Sandeep was also injured and lying unconscious. Rukmania PW-11 is very old lady aged 85 years and has deposed that she had identified only one of the appellants i.e Ramesh Kumar who had assaulted her. Due to poor vision, she could not identify the other appellants. Kanti Devi who is the wife of Bhagwat has also corroborated the testimony of Bhagwat by saying that the appellants had assaulted Bhagwat by lathi. Hearing his shouts, she and her children came out whereupon the appellants assaulted Manjeet, Sandeep and Rukmania Bai and thereafter assaulted her also. Satyanarayana PW-14 is an independent witness who has testified regarding the entire incident. He has stated that all the appellants were assaulting Sandeep. Bhagwat PW-16 has corroborated the testimony of above witnesses in toto. These witnesses, though relatives, received injuries during the occurrence and their presence on the scene of occurrence was not disputed by learned counsel for the appellants during arguments. Their testimony finds corroboration from medical evidence of Dr. P.L.Verma PW-4 and Dr. M.K. Jain, PW-19.

09. Having considered the evidence led by the prosecution in its entirety we find that the conviction of the appellants and the sentences awarded for offences under section-148 and section-323 read with section-149 of the I.P.C. is well founded and does not call for any interference. Hence, the same is upheld. So far as the conviction of the appellants under secion-304 Part-I read with section-149 of the I.P.C. is concerned, we find that Sandeep had sustained only one swelling on the right side of head with no lacerated or incised wound thereon. He had sustained fracture of right parietal bone. Dr. Verma opined that death was due to coma as a result of head injury. PW-23 Manjeet has stated that

the appellant Shashibushan had assaulted Sandeep on the skull with a lathi, whereas other witnesses namely Rukmania PW-11, Kanti Devi PW-12, Satyanarayan PW-14 and Bhagwat PW-16 had made an omnibus statement that all the appellants were assaulting Sandeep. Therefore, in view of the above evidence, appellant Shashibhusan attacked Sandeep with a lathi on the vital part of body i.e. head and while assaulting with lathi on the vital part of body Shashibhusan had definite knowledge that by assaulting with a lathi on the vital part of body i.e. head, death of Sandeep can be caused. Now coming to the question of sharing common object and knowledge by other accused persons with Shashibhusan, who attacked Sandeep with a lathi on his head is concerned, the manner in which the appellants had come to the house of Bhagwat in a jeep well prepared for the fight and the evidence of Satyanarayana PW-14 clearly shows that the appellants had with full deliberation gone to the house of Bhagwat in a jeep to assault and to indulge into fight armed with lathis. Sharing of common object by all the appellants can be inferred from the manner in which *Maarpeet* took place and in furtherance of that common object Shashibhusan assaulted Sandeep with a lathi on his head and other accused persons assaulted with lathi to the other witnesses. The injuries sustained by Baijnath (PW-10), Rukmaniya (PW-11) Bhagwat (PW-16), Manjeet (PW-23) clearly reflect the manner in which the incident took place which shows that the other accused persons had also definite knowledge and they were sharing the common object with each other as well as Shashibhusan that by assaulting and attacking with a lathi there is every likelihood that they may cause death of anybody. Therefore, in view of the evidence of the witnesses namely Rukmania PW-11, Kanti Devi PW-12, Satyanarayan PW-14 and Bhagwat PW-16 it is established that the other accused persons were also sharing the common object to cause death and in furtherance of that

common object of the unlawful assembly Shashibhusan assaulted Sandeep on his head, as a result of which he died.

10. In ***Charan Singh and others Vs. State of U.P.*** reported in **2004 A.I.R. SCW-1329,** it was observed by the Apex Court as under:

> ".....The crucial question to determine is whether the assembly consisted of five or more persons and whether the persons entertained one or more of the common objects, as specified in Section-141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section-141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it."
>
> ".....Further the plea that definite roles have not been ascribed to the accused and, therefore, Section-149 is not applicable is untenable"

Since in this case the object of the unlawful assembly is clearly discernible, when Shashibushan dealt a blow to Sandeep on the head by *lathi* during the fight which was going on and in which all the appellants were involved common object of the other appellants can safely be inferred. As such the trial Court has rightly reached to the conclusion and held that the other accused/appellants were also sharing common object with Shashibhusan and therefore, they have been rightly convicted with the aid of Section 149 of Indian Penal Code.

11. Culpable homicide does not amount to murder only when the act committed by the appellants would fall within one of the Exceptions to section-300 of the I.P.C. In this case, the

appellants had no enmity with Bhagwat or his sons. They were agitated at the spur of moment when Bhagwat intervened between Baijnath and the appellants. The manner of *Marpeet* is clearly indicative of the fact that passions had been aroused to a large extent. In the case of ***Sukhbir Singh Vs. State of Haryana (2002)3 Supreme Court Cases-327,*** the Hon'ble Apex Court has observed that to avail the benefit of Exception-4 to Section-300, the defence is required to probabilise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to.

12. Applying the test laid down by the Apex Court to the facts and circumstances of the case, we are of the considered opinion that the appellants had, in furtherance of the common object of their unlawful assembly caused the death of Sandeep in a heat of passion upon a sudden quarrel with Baijnath in which Bhagwat and his family members intervened. The only question which now remains to be considered is whether the conviction of the appellants for the offences punishable under Section-304 Part-I read with Section-149 of the I.P.C. is proper or not. The autopsy report of Sandeep clearly goes to show that he had sustained only one external injury on the head which was swelling on the right side of the skull with fracture of right parietal and zygomatic bone and laceration of right parietal area underneath. No other injury was found on Sandeep. In the facts and circumstances of the case, in our considered opinion and also in view of the abovementioned injury found on Sandeep, the requisite intention for causing the death of

Sandeep cannot be attributed to the appellants. The appellants however can be attributed with the knowledge that the manner in which Shashi Bhushan had assaulted Sandeep by the *lathi*, it was likely to cause his death. Therefore, the offence committed by the appellants squarely falls under Section-304 Part-II read with section-149 of the I.P.C.

13. Accordingly, the appeal is partly allowed. The conviction of the appellants is altered to Section-304 Part-II of the I.P.C. Looking to the nature of the sole injury sustained by Sandeep and the facts and circumstances of the case, in our considered opinion, a sentence of rigorous imprisonment for 5 years would meet the ends of justice. The appellants are accordingly sentenced to rigorous imprisonment for 5 years under section 304 Part-II read with section-149 of the I.P.C. Conviction of the appellants and the sentences awarded for offences under Section-148 and Section-323 read with Section-149 of the I.P.C. is maintained. The custodial sentence undergone by the appellants from 30-08-2002 till date as also the period of detention already undergone by the appellants as under trial prisoners shall be set off under section-428 of the Cr.P.C.

Sd/-
L.C.BHADOO
Judge

15th-09-2005

Sd/-
Dilip Raosaheb Deshmukh
Judge

15 -09-2005

Satish